

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

76-7591 & 77-7016

To be argued by
Norman Leonard Cousins

United States Court of Appeals

For the Second Circuit.

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU,
MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA
KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI
MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS,
INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH
REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORA-
TION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK.

Reply Brief of Plaintiffs-Appellants, Zohar Landau,
Mordechai Muscatel and Hagai Koren.

FUCHSBERG & FUCHSBERG

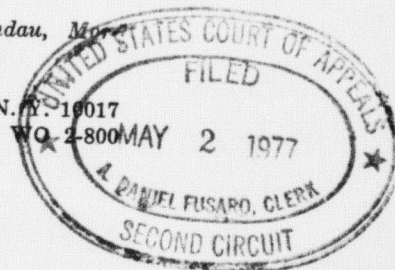
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA
LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI
KOREN and DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU,
MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

-against-

STANDARD PRECISION, A DIVISION OF ELECTRONIC COMMUNICA-
TIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE
NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN
ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

- - - - -X

REPLY BRIEF OF PLAINTIFFS-APPELLANTS ZOHAR LANDAU,
MORDECHAI MUSCATEL AND HAGAI KOREN.

POINT I.

CONDON & FORSYTH HAVE NOT REPRESENTED THE CREW MEMBERS
SINCE JULY 16, 1974, WHEN FUCHSBERG & FUCHSBERG
WERE SUBSTITUTED IN THEIR PLACE AND STEAD.

In order to avoid the principle of law and equity
that one party should not be punished for the errors and
omissions of another, defendants-appellees now argue for
the first time on appeal that Israel Aircraft's attor-

neys, Condon & Forsyth, still represent the crew members, Zohar Landau, Mordechai Muscatel and Hagai Koren, who should therefore be penalized for the failings of Condon & Forsyth.

Defendants-appellees urge this position upon the Court in reliance upon General Rule 4(c) of the United States District Court General Rules for the Southern and Eastern Districts of New York.

Assuming that said Rule is applicable, it is conceded that it was never complied with in that a motion was never made for the formal substitution of Fuchsberg & Fuchsberg in place and stead of Condon & Forsyth as attorneys of record for the crew members. The reason for that is that Fuchsberg & Fuchsberg and Condon & Forsyth (and probably Mendes & Mount) were unaware of the existence of that Rule.

In State Court, the practice with which this writer is concededly more familiar, there is no rule comparable to Rule 4(c) of the Southern and Eastern Districts. No motion is required in State Court unless the outgoing or "substituted" attorney refuses to turn over the file. No such recalcitrance existed here. Standard Consents to Change Attorney (Blumberg Forms 317) were duly executed by each of the plaintiffs and the outgoing attorney, Condon & Forsyth. Condon & Forsyth fully cooperated in the turnover of the file to the incoming attorneys, Fuchsberg

& Fuchsberg, and there was no need for recourse to the Courts. That a formal motion to approve the substitution should have been made *anyway*, the attorneys did not know.

Following the substitution of Fuchsberg & Fuchsberg as counsel for the crew members in place and stead of Condon & Forsyth, Fuchsberg & Fuchsberg appeared as attorneys of record for the crew members at every deposition subsequently held. This included the depositions of each of the crew members as well as depositions of numerous non-party witnesses. Fuchsberg & Fuchsberg appeared as attorneys of record for the crew members as each was examined by a physician on behalf of the defendants. We stipulated to the pre-trial order as attorneys of record for the crew members and, of course, Fuchsberg & Fuchsberg appeared as attorneys of record by Norman Leonard Cousins, as Trial Counsel, through the liability and then the damage trials. At no time was any objection thereto ever taken by the defendants-appellees nor the Trial Court.

When parties to a civil litigation comport themselves and proceed as if an order had been signed, "they have charted their own course and are deemed to have consented to the law to be applied. 'Parties to a civil litigation, in the absence of a strong, countervailing public policy, may consent, formally or *by their conduct*, to the law to

be applied.'" *Trophy Productions, Inc. v. Cinema-Vue Corp.*, A. D. 2d , 385 N. Y. S. 2d 70 (1st Dept. 1976), and numerous cases cited therein. For application of similar principles, see *Lampman v. Cairo Central School District*, 47 A. D. 2d 794, 366 N. Y. S. 2d 237 (3rd Dept. 1975), and *Myers v. Empire State Building*, A. D. 2d , 384 N. Y. S. 2d 867 (2nd Dept. 1976).

Nevertheless, so the record may be technically as well as factually correct, Fuchsberg & Fuchsberg herein and hereby respectfully moves this Court for an order pursuant to Rule 4(c) of the General Rules for the Southern and Eastern Districts of New York formally substituting the firm of Fuchsberg & Fuchsberg in place and stead of Condon & Forsyth as attorneys of record for all plaintiffs herein except Israel Aircraft Industries, Ltd., *nunc pro tunc* as of July 16, 1974, on the grounds that a conflict of interests exists between Israel Aircraft Industries, Ltd., and the crew members, and that it would be and always has been in the best interests of the crew members that they be represented by counsel other than Condon & Forsyth.

POINT II.

IT WAS JUDGE CARTER'S ERRONEOUS STATEMENT FROM THE BENCH IN OPEN COURT WITH THE CREW MEMBERS PRESENT THAT "THE INDIVIDUAL PLAINTIFFS ARE NOW IN FACT SUEING ISRAEL AIRCRAFT INDUSTRIES" THAT LED TO THE DISCLOSURE OF THE DEEDS OF RELEASE AND FULL AND FINAL ACCORD.

Considering that Fuchsberg & Fuchsberg and Condon & Forsyth are adversaries by virtue of the jury's determina-

tion that Israel Aircraft was 65% responsible for the crash of 029 and the crew members' injuries, there is a remarkable degree of consistency in the firms' recitation of what happened after the jury's verdict on liability, when it happened, and why.

The one area of conflict that troubled this writer was footnote "***" in the affidavit of Herzela Ron (304a). In sum and substance, it states that Mr. Atzmon of Israel Aircraft was not the moving force behind Zohar Landau's bringing the existence of possible releases to this writer's attention when he did.

When Zohar Landau first brought the subject to my attention during the damage trial, he did mention the name Atzmon. This led me to believe that the information had just been conveyed to him by Mr. Atzmon. Under the pressures of the moment, I did not particularly care where he had gotten the information. What *was* important was whether it was true or not. The steps I took to learn that are recited in my main brief (at pp. 17-18) and need not be repeated here. Because Atzmon denies, however, that he was either in New York or spoke to Landau or Koren during this period, I personally called Landau in Israel on April 13, 1977, and asked him specifically, "what made him bring up the subject with me *when he did?*"

He said, "Because the Judge said we [meaning the crew members] were sueing IAI and I thought we had signed a

piece of paper back in 1970 or '71 and Mr. Atzmon had explained that we could not sue IAI, and even though I wasn't sure, I thought I had better bring it to your attention."

If the Court will refer to pages 359(a) - 360(a) of the Appendix, it will find that Zohar Landau is absolutely correct. Though 100% wrong (and later admitting so after reading the Memorandum of Law of Plaintiffs Landau, Muscatel and Koren Regarding Contribution and Judgment and conferring with his law clerks) Judge Carter did state in open Court with the crew members present, "that - the individual plaintiffs are now in fact suing Israel Aircraft * * *" (359a).

I indicated to the Court that "It is a misstatement to indicate to the jury that the crew members are suing IAI. We are not. We would get a judgment against the defendants" (360a).

But the Court insisted, "You will not. You will get a judgment in this Court against IAI" (360a).

Fortunately, we persuaded Judge Carter not to say anything to the jury, as he had indicated he would (359a), until he read our Memorandum of Law, and he agreed not to. As the Court can see from page 367a of the Appendix, Trial Judge and Counsel finally got squared away and the correct explanation of the law was ultimately given to the jury.

It was based wholly on Judge Carter's statements from the bench on January 28, 1976, that Landau thought he recalled the piece of paper that he may have signed and an explanation he thought he had been given by Mr. Atzmon MORE THAN SIX YEARS EARLIER that he could not sue Israel Aircraft. Herzela Ron's statement regarding Mr. Atzmon at page 304a is absolutely correct, and I trust this will clarify the "sequence of events that led to the revelation of the releases [which defendants contend] is still not clear in the record" (brief for defendants-appellees, p. 11).

POINT III.

DR. HERMAN'S UNSWORN "AFFIDAVIT" WAS SUBMITTED SOLELY BY AND ON BEHALF OF ISRAEL AIRCRAFT AND IS IN NO WAY BINDING ON THE CREW MEMBERS.

Point IV of defendants-appellants' Argument is based on statements and opinions of Dr. Herman, Israel Aircraft's counsel in Israel. Dr. Herman does not speak for the crew members; he has not interviewed them; and he does not represent them. Any and all unsworn statements and opinions expressed by him are expressly disclaimed by the crew members.

POINT IV.

THE DISTRICT COURT'S SOLE BASIS FOR ITS DISMISSAL OF THE PLAINTIFFS' COMPLAINT WAS BECAUSE IT HAD DETERMINED *SUA SPONTE* THAT ALL PLAINTIFFS AND THEIR ATTORNEYS HAD KNOWINGLY, WILLFULLY AND FRAUDULENTLY CONCEALED THE EXISTENCE OF THE CREW MEMBERS' DEEDS OF RELEASE FROM THE DEFENDANTS AND FROM THE COURT.

The District Court dismissed the plaintiffs' complaint because it had determined *sua sponte* that all plaintiffs and their attorneys had knowingly, willfully and fraudulently concealed the existence of the crew members' Deeds of Release and Full and Final Accord from the defendants and from the Court (225a). It did not dismiss the complaint because of champerty, maintenance or illegality and defendants-appellees' nine-page discussion thereof is not only an insult to counsel, but a ridiculous waste of this Court's time. What it does demonstrate is the defendants-appellees' hopes that if the Second Circuit will not sustain the District Court's actions on the grounds stated therefor by the District Court, that it might do so on some other grounds.

As an officer of this Court, whose integrity and reputation is more important to him than any case he ever had or will try, and because District Judge Robert L. Carter was so totally wrong in what he did, I beg this Court not to do so.

CONCLUSION.

It is respectfully submitted that the orders appealed from herein should be reversed in all respects and the matter remanded to the District Court before a different judge for a determination on the merits of the issues raised by Israel Aircraft and defendants' post-trial motions, the crew members' opposition thereto, and the effect and validity, if any, to be given to the agreements under review.

Respectfully submitted,

FUCHSBERG & FUCHSBERG,
Attorneys for Plaintiffs-
Appellants Zohar Landau,
Mordechai Muscatel and
Hagai Koren.

NORMAN LEONARD COUSINS,
Of Counsel.

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